Office-Supreme Court, U.S.
FILED
APR 8 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1496

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

UNDERWRITERS NATIONAL ASSURANCE COMPANY,

*Petitioner,*

vs.

NORTH CAROLINA LIFE AND ACCIDENT AND HEALTH INSURANCE GUARANTY ASSOCIATION, JOHN RANDOLPH INGRAM, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

*Respondents.*

## PETITIONER'S REPLY BRIEF

Theodore R. Boehm
(Counsel of Record)
Charles T. Richardson
BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, Indiana 46204
(317) 636-4535

Counsel for the Petitioner)

Central Publishing Company, Inc., Indianapolis, IN 46206

## JURISDICTION — CERTIORARI TO THE NORTH CAROLINA SUPREME COURT IS PROPER

The North Carolina Supreme Court (a) denied discretionary review (presumably as to the state law issues raised before that court) and (b) dismissed an appeal. The order is at 1A-2A of the appendix to the petition. An appeal as of right is available under North Carolina procedures if a federal constitutional issue is raised. N.C.G.A. 7A-30. The only issue raised here is, of course, the federal constitutional point. Under those circumstances, the Supreme Court of the state of North Carolina is the "highest court of a State in which a decision could be had" as to the issue presented to this Court within the meaning of 28 U.S.C. § 1257. *Tumey v. Ohio*, 273 U.S. 510, 515 (1926) is squarely in point. *See generally*, STERN & GRESSMAN, SUPREME COURT PRACTICE 204-206 (5th ed. 1978).

## THE DECISION IS INDEED "CATACLYSMIC"

Respondents argue that the "cataclysmic" (Resp. 18) impact of the decision below is avoided because respondent (or the North Carolina policyholders) may be analogized to secured creditors who may receive a preference in a bankruptcy. The point, however, is that in order to receive their priority, secured creditors must assert it in the bankruptcy, not in a later proceeding. The decision below holds that the rights of the North Carolina policyholders or respondent guaranty association were not and *could not be* adjudicated in Indiana because of the asserted jurisdictional defect. For that reason, the decision is, to use respondents' term, cataclysmic.

Respondents also seek to attack the notice to North Carolina policyholders and/or the adequacy of their representation. First, that is not a basis of the holding below, which is that regardless of any notice, the Indiana

court could not adjudicate the rights of North Carolina policyholders or respondent in the deposit in that state. Second, notice as to the deposit is wholly immaterial to the North Carolina *policyholders* because their rights under the policies as written were fully protected and preserved by the obligations of respondent as a guaranty association. The real party in interest as to the North Carolina policies was the respondent guaranty association. It is an association of 604 insurance companies and is charged with knowledge of the deposit laws of its state. It was a named party to, and participated in, the rehabilitation proceeding. Third, this issue was not raised in the subsequent 1978 Indiana proceeding and is itself waived. The 1978 Indiana holding is entitled to full faith and credit.

Finally, petitioner agrees that the North Carolina deposit could have been allocated under North Carolina law to North Carolina policyholders *if* that were done before the judgment of rehabilitation. That is all respondents' cases stand for. Of course, if that had been done, an appropriate adjustment would have been made to the North Carolina policy rights under the plan. It was not done. As a result, the judgment is entitled to full faith and credit as entered.

Respectfully submitted,

Theodore R. Boehm
(Counsel of Record)
Charles T. Richardson
BAKER & DANIELS
810 Fletcher Trust Building
Indianapolis, Indiana 46204
(317) 636-4535

Counsel for the Petitioner